

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

MONDAY, THE 12TH DAY OF JANUARY 2015/22ND POUSHA, 1936

RFA.No. 195 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN OS 227/1994 of SUB COURT, PALA
DATED 04-12-2010

APPELLANT(S) /APPELLANT/PLAINTIFF:

ROSAMMA
W/O MATHEW, NEDUMBALAKUNNEL, VALLICHIRA VILLAGE,
MEENCHIL TALUK.

BY ADV. SRI.JOSHI N.THOMAS

RESPONDENT(S) /DEFENDANTS:

1. GEORGE JOSEPH
S/O OUSEPH, KODIYAN PURAYADATHIL VEETIL, ANDOOR KARA
ELAKKADU VILLAGE, MEENACHIL TALUK, (DIED). 686589.

2. KUNJUJAMMA, NOW AGED 52,
W/O GEORGE JOSEPH, KODIYAN PURAYADATHIL VEETIL,
ANDOOR KARA, ELAKKADU VILLAGE,
MEENACHIL TALUK. 686589.

3. SIMI, NOW AGED 22,
D/O GEORGE JOSEPH, RESIDING AT -DO- -DO-.

4. SIJA, NOW AGED 27,
D/O GEORGE JOSEPH, RESIDING AT -DO- -DO-.

5. CINI, NOW AGED 19 YEARS,
D/O GEORGE JOSEPH, RESIDING AT -DO- -DO-.

R,R2,3,4 BY ADV. SRI.TOM JOSE (PADINJAREKARA)
R,R2,3,4 BY ADV. SRI.V.SETHUNATH
RR5 BY ADV. SRI.N.K.SUBRAMANIAN
RR5 BY ADV. SRI.S.ANANTHAKRISHNAN
RR5 BY ADV. SRI.C.S.DIAS
R5 BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.MANOJ.P.KUNJACHAN SENIOR GOVERNMENT PLEADER

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 9-12-2014,
THE COURT ON 12-01-2015 DELIVERED THE FOLLOWING:

K.ABRAHAM MATHEW,J

R.F.A.NO.195 OF 2011

Dated this the 12th day of January, 2015

JUDGMENT

Plaintiff is the appellant. She and the 1st defendant are daughter and son respectively of one Ouseph Ouseph and his wife, Aley. The plaint schedule items 1 and 2 belonged to him. He executed a will in 1979 by which he bequeathed the plaint schedule properties to his wife, Aley, and after her death to the 1st defendant. Aley was given the right of alienation. But later by sale deed No.159 of 1991 he sold plaint schedule item No.1 to the plaintiff through his power of attorney holder. After his death in 1991 Aley sold plaint schedule item No.2 to the plaintiff by sale deed No.903 of 1992. Thus the plaintiff became the owner of both items of properties. The 1st defendant, along with his wife and children who are the additional defendants, resides in the property in his capacity as son of Ouseph Ouseph. Though the plaintiff demanded him to vacate the property; he refused to do so. She apprehended that the defendants would commit mischief in the property. On these allegations she prayed for declaration of her title to and possession of plaint schedule properties, recovery of plaint schedule item No.2 with mesne profits at the rate of Rs.3000/- per annum and a perpetual injunction prohibiting committing

mischief in the properties.

2. After the institution of the suit the 1st defendant died. Defendants 3 to 5 were minors. The 2nd defendant filed a written statement for herself and for and on behalf of the minor children. Their main contentions are as follows: By the will Ouseph Ouseph has bequeathed the plaint schedule properties to the 1st defendant. The power of attorney on the basis of which the sale deed was executed in favour of the plaintiff is not genuine. If it is considered genuine, Ouseph Ouseph revoked the will by the power of attorney. The mother, Aley, had no right to alienate plaint schedule item No.2. The first defendant effected improvements in plaint schedule item No.2 and if the defendants are found liable to be evicted, they are entitled to the value of the improvements.

3. The trial court took the view that the power of attorney did not empower the holder to execute a sale deed and the sale deed is invalid. It also found that the will executed by Ouseph Ouseph authorised his wife, Aley, to alienate the property only if it was necessary for her maintenance and in the absence of any evidence to prove the necessity the sale deed executed by her in favour of the plaintiff in respect of plaint item No.2 is invalid. Consequently, it dismissed the suit. The plaintiff has come up in appeal.

4. Plaint schedule items 1 and 2 belonged to Ouseph Ouseph. Ext A13 is the will executed and registered by him on 18.6.1979, the genuineness of which is not in dispute. By the will he bequeathed plaint schedule items 1 and 2 to the 1st defendant, the total extent being 1 acre 50 cents. But on the strength of Ext A2 dated 6.6.1990 which is purported to have been executed by Ouseph Ouseph one Mathai executed Ext A1 sale deed dated 25.1.1991 in favour of the plaintiff in respect of 50 cents which is described as plaint schedule 1st item. The defendants contended that the power of attorney is a fabricated one and the sale deed executed on its basis is void. The learned Sub Judge did not examine the genuineness of the power of attorney. It appears that he took it for granted that it is a genuine document. But he took the view that it did not empower the holder to execute a sale deed and therefore, the sale deed is void.

5. When Ext.A2 power of attorney was allegedly executed by Ouseph Ouseph he along with his wife, Aley, was residing in Bangalore in a home for the aged. Ext.A2 is a registered document. It was drafted by an advocate by name Patil. The 2nd witness is the advocate himself. Against witness No.1 the name K.K.Joseph is written. But his signature is not seen. It is also not known whether the advocate had personally known Ouseph Ouseph.

6. The power of attorney was tendered through the plaintiff, who was examined as PW1. In answer to a leading question put in her examination in chief she said that the signature appearing in the power of attorney is that of her father in-law, Ouseph Ouseph. Admittedly, she did not see his signing the document. Her testimony proves that for the first time she saw the power of attorney only on the date of execution of the sale deed in her favour. Though Aley, wife of Ouseph Ouseph, was examined as PW2, the power of attorney was not even shown to her so that she might identify her husband's signature. It is true that she stated that her husband had executed a power of attorney. But that will not prove genuineness of Ext.A2.

7. The plaintiff relies on Exts.A4 letter allegedly written by Ouseph Ouseph to prove that Ext.A2 power of attorney is genuine. In Ext.A4 letter there is a statement to the effect that he had executed and registered a power of attorney in favour of one Mathai. The testimony PW1 that Ext.A4 is a letter written by Ouseph Ouseph was challenged in the cross-examination. But the admission made in paragraph 3A of the written statement proves its genuineness. The defendants rely on it to contend that the will had been revoked by Ouseph Ouseph. The statement in Ext.A4 letter proves genuineness of Ext.A2 Power of Attorney

8. Did Ext A2 power of attorney empower Mathai to execute a sale deed? The relevant clause is clause No.12 in Ext A2 which is in English. It runs as follows: "My attorney is also authorised to negotiate for the sale of the schedule property to any intending purchaser/s and enter into an agreement of sale and also present the sale deed for registration before the concerned Sub-Registrar and admit execution and registration of the same on my behalf as if myself were present personally for the above purposes and completed the formalities on my behalf".

9. It gives the holder power to do three things only:

- 1) To negotiate sale of the property
- 2) To enter into an agreement for sale
- 3) To present sale deed for registration.

It is one thing to say that the power of attorney holder has been given the power to execute a sale deed and another thing that he has been given the power to present the sale deed for registration. They are not one and the same. Evidently, Ext.A2 power of attorney did not empower Mathai to execute a sale deed. This is made clear in Ext.A4 letter the reason for accepting its genuineness will be given later - in which Ouseph Ouseph declares that what he wants the power of attorney is to execute a settlement deed in favour of the 1st defendant in respect of the plaint

schedule properties with a condition that he (the 1st defendant) shall pay the plaintiff Rs.1,50,000/-. The learned Sub Judge was right in taking the view that Ext A1 sale deed executed by Mathai in favour of the plaintiff/appellant on the strength of Ext A2 is invalid.

10. Whether Ext.A13 will was revoked by Ext.A2 power of attorney? Section 70 of the Indian Succession Act provides that the document by which the testator declares his intention to revoke the will should be executed in the manner in which an unprivileged will is required to be executed. But as noted above, Ext.A2 power of attorney has been attested only by one witness, who is the advocate who prepared the power of attorney. The document does not revoke the will.

11. The will says that 1 acre 50 cents, which is described in A schedule to the will (plaint schedule items 1 and 2) is bequeathed to the testator's son George, who is the 1st defendant in this case, and the property described in B schedule to his daughter Claramma. The will further states: " Therefore, after the death of myself and my wife the legatees shall take possession of the properties and enjoy them absolutely effecting mutation of names in their favour and paying tax. If my wife survives me, the properties shall belong to her absolutely and she shall have the power to mortgage or sell them and the legatees shall take them absolutely after her death".

12. Out of the above 1 acre 50 cents the testator's wife, Aley, sold to the plaintiff 1 acre described as plaint schedule item No.2, by Ext.A3 sale deed. The defendants' case is that Aley had only life interest in the property and she had no authority to alienate it.

13. The learned Sub Judge held that Aley had no authority to sell the property. The reason is given in paragraph 14 of the judgment:

“But the entire construction of Ext.A13 document shows that the intention of the father was that after his death if his wife is not properly maintained by the son, there will be some provision for the livelihood of the wife. So he permitted the wife to create charge or to sell the property. In order to create a charge or to dispose the property there will be clear reason. In the sale deed executed by the mother in favour of the plaintiff no such reason is given. The reading of Ext.A13 document shows that the intention of the testator at the time of execution of Ext.A13 is that the property will devolve upon the 1st defendant after his death. There is also a provision that if the daughters of the executant who are nuns returned to their normal life they also be permitted to reside in the building situated in the property till their death. All these facts shows that the mother never got any right to execute sale deed without any sufficient ground”.

In Ext.A13 will there is not even a whisper that Aley had the authority to alienate the property only if the 1st defendant did not properly maintain

her. There is no condition attached to her right to alienate the property. The reason given by the learned Sub Judge cannot be approved of.

14. Now the question is whether Aley had only life interest in the property or whether she had absolute right to it.

15. There are a catena of decisions of the Supreme Court with regard to the rules of interpretation of a will. ***Ramkishorlal v. Kamalnarayan (AIR 1963 SC 890). Pearey Lal v. Rameshwar Das (AIR 1963 SC 1703). Ramachandra v. Hilda Brite (AIR 1964 SC 1324). Mauleshwar Mani and others v. Jagdish Prasad and others (2002) 2 SCC 468). Sadaram Surya Narayana and another v. Kalla Suryakantham and another (AIR 2011 SCC 294). Sidda Murthy Jayarami Reddi v. Godi Jayarami (AIR 2011 SC 1342)*** are some of the decisions cited at the bar.

16. In *Pearey Lal v. Rameshwar Das* (supra) the four Judge Bench of the Supreme Court has observed as follows: “..... but in constructing a will the court should tried best to get at the intention of the testator by reading the will as a whole. We must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative it is also well recognised rule of construction that the court will look at the circumstances under which the testator makes his

will such as the state of his property, of his family and the like”.

17. The testator and his wife, Aley, were not looked after by he 1st defendant. At the fag end of their life they took refuge in a home for the aged in another State. But Ext.A13 will was executed long ago in 1979. The subsequent events are not relevant to construe the will.

18. The learned counsel for the respondents relies on the decision of the Delhi High Court in ***Raghubir Singh and others v. Budh Singh and others (AIR 1978 Delhi 86)***. The relevant clause in the will in that case was:

“After my death my wife Shrimati Bakhtawari aforesaid, shall become the absolute owner of my entire movable and immovable property. She will have the right to transfer the aforesaid property in the manner she likes”.

The question was about the nature of the right of the widow. The court held that the will conferred only a life estate on the widow in respect of the immovable property. It cut down absolute estate to life interest to give effect to the whole of the will and to respect the real intention of the testator. It relied on the following observations of the Supreme Court in ***Navneet Lal v. Gokul (AIR 1976 SC 794)***:

“(1) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. xx xx xx Where apparently

conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator.

(2) To the extent that it is legally possible, effect should be given to every disposition contained in the will unless the law prevents effect being given to it. xx
xx xx xx If the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will”.

19. The later decision of the Supreme Court in ***Mauleshwar Mani and others v. Jagdish Prasad and others (2002) 2 SCC 468*** is very significant. The essential facts of that case are seen in paragraph 8 of the judgment.

“The first part of the will provided that after the death of the testator or author of the will, his wife whose name is Smt. Sona Devi would be entitled to the entire assets and properties of Jamuna Prasad with the right of transfer. The second part of the will is that after the death of Smt. Sona Devi nine sons of the daughters would inherit the property.”

The question was whether Smt.Sona Devi acquired absolute estate or

only a limited estate under the will. The Apex court held:

“It is obvious from the aforesaid clause that the testator conferred an estate by providing that the wife would be entitled to get the property with right of alienation. Where the property has been given by a testator to the devisee with a right of alienation such bequeath is a conferment of an absolute estate. Thus the first devisee was to get the property with a right of transfer under the will and under subsequent clause the very same property was to go to the nine sons of the daughters after the death of the first devisee. The will, therefore, gave in the express term inheritable estate with power of alienation to Smt Sona Devi. We are, therefore, very clear in our mind that what was given to Smt Sona Devi was an unlimited and an absolute estate.”

The Supreme Court approved the observation of the Privy Council in ***Rameshwar Bakhsh Singh v. Balraj Kuar (AIR 1935 PC 187)*** that where absolute estate is created by a will in favour of devisee the clauses in the will which are repugnant to such estate cannot cut down the estate but they must be held to be invalid.

20. In Ext.A3 will the testator first gives absolute estate to his son George and daughter Claramma. It is followed by the following sentence: “Therefore, after the death of myself and my wife the legatees shall take possession of the properties and enjoy them absolutely

effecting mutation of names in their favour and paying tax”. Though this is a separate sentence, it should be read as part of the earlier sentence. They convey one idea only. George and Claramma are given absolute estate and the wife life estate; George and Claramma are entitled to absolute enjoyment only on the death of the testator's wife. It is true that the life estate given to the wife is not explicitly stated in the above clause. It is by the next clause the testator gives right to his wife Aley in the following words. “If my wife survives me, the properties shall belong to her absolutely and shall have the power to mortgage or sell them and the legatees shall take them absolutely after her death.”

21. If the rule of interpretation given in Section 88 of the Indian Succession that where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last will prevail, is applicable to the facts of the case, neither the first defendant, nor Claramma will get any right in the property. In ***Uma Devi Nambiar Vs.Sidhan (AIR 2004 SC 1772)*** the Supreme Court has observed that the above rule of interpretation can be invoked if different clauses cannot be reconciled. This is a rule of necessity. When the court cannot give effect to both clauses even by interpretation and is compelled to prefer one clause to the other, it shall prefer the later clause in the will according to this rule. This is a situation in which the court is unable to ascertain the intention of

the testator as there is no scope for interpretation. In other words, in a case where there are materials to ascertain the intention of the testator the rule cannot be invoked. As observed in various decisions of the Apex court referred to above, the court shall, if possible, give effect to both clauses. I shall presently examine whether facts and circumstance are available to know the intention of the testator.

22. There are two cogent circumstances which help the court reach a definite conclusion as to what the testator's intention was. The first is that he could not have intended Aley to dispose of the property given to daughter Claramma since it was given to her in lieu of her patrimony. (It is a different matter that she was given money later). The second is that in his Ext.A4 letter written on 21.6.1990 about 10 years after the execution of the will and about one year before his death the testator declared that what he wanted the power holder was to execute a settlement deed in respect of the plaint schedule properties in favour of the 1st defendant with a condition that he (the son) should pay the plaintiff 1 ½ lakh rupees.

23. The only possible conclusion is that Aley had only life interest in the properties of the testator. She had no absolute right. She had no authority to alienate the property. The plaintiff/appellant has not acquired any right in the plaint schedule item No.2 also. Though for

different reasons, I agree with the learned Sub Judge that Ext.A3 sale deed executed by Aley in favour of the power of attorney is invalid.

24. The claim of the plaintiff/appellant that she has title to the properties was rightly rejected by the trial court. She is not entitled to any relief. No interference is called for.

In the result, this appeal is dismissed. No costs.

**K.ABRAHAM MATHEW
JUDGE**

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